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ABSTRACT

In 1974, the National Council of Juvenile and Family Court Judges initiated a special project to promote, in courts throughout the country, periodic review of the status of all children in foster care. This paper explains the development of these judicial review systems, describes several alternative review mechanisms, and discusses key issues related to the successful implementation of court monitoring of the status of all children in foster care. In addition, the expected impact of a new Federal law germane to this subject, the Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272), is briefly analyzed. Concluding remarks suggest that periodic court review is an excellent mechanism to assure that public agencies legally responsible for children in foster care plan effectively to meet those children's long-term, permanent needs. With the help of a properly functioning judicial review process, harms perpetrated by child welfare systems on children and parents can be corrected. (RH)

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PERIODIC JUDICIAL REVIEW OF CHILDREN IN FOSTER CARE

Issues Related to Effective Implementation

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PERIODIC JUDICIAL REVIEW

OF CHILDREN IN FOSTER CARE

Issues Related to Effective Implementation

By

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INTRODUCTION

Many studies of the American foster care system conducted in the past decade have revealed that of the hundreds of thousands of children in a system administered by city, county or state social services agencies, a sizeable percentage have been "adrift", neither returning to their natural families nor legally freed for adoption.[1] Administrative agencies have been losing track of the legal status, time in foster care, and even whereabouts of large numbers of children. Without diligent case planning and monitoring, these children have been indefinitely relegated to a state of limbo, being shuttled from foster home to foster home and suffering a high degree of emotional and physical insecurity.

The abandonment of these children by the public agencies responsible for their care has been at great financial cost to the taxpayers. In Fiscal Year 1977, states received approximately $183 million in Federal matching funds for foster care services[2], and one estimate placed the annual total Federal/state/private expenditures for such care at $2 billion[3]. One response to this problem has been to involve the juvenile and family courts in a periodic review of the status of all children in foster care, in order to determine the necessity of keeping them in this system.

The first, comprehensive legislative effort to provide for such reviews occurred in 1971 in the State of New York.[4]

In 1974, the National Council of Juvenile and Family Court Judges initiated a special project to promote such reviews in courts throughout the country. This paper will explain the development of these judicial review systems, describe several alternative review mechanisms, and discuss key issues related to the successful implementation of court monitoring of the status of all children in foster care. Finally, the expected impact of a new Federal law germane to this subject, P.L. 96-272, will be briefly analyzed.

DEVELOPMENT OF REVIEW MECHANISMS

Foster care is intended to be a form of short-term, substitute parental care. Yet studies have found that the average foster care placement lasts five years, and that the longer a child remains in foster care, the more likely he or she is to lose contact with his or her natural parents and to remain in foster care until the age of 18.[5] Clearly, the accountability mechanisms of the agencies responsible for the care of these children have broken down.

In New York City alone, during the early 1970's there were approximately 26,000 children in foster care.[6] Thus it was not coincidental that in mid-1971 the New York State Social Services Law was modified to require that the authorized agency charged with the care of every child in foster care periodically file a petition in Family Court seeking a review of the child's status. This was the first law of its type in the country, and a number of other state laws

mandating such periodic court reviews have been enacted subsequently.[7] In fourteen states, judges are now charged with responsibility for a foster care review system,[8] and with new Federal incentives (see below) these numbers can be expected to soon increase dramatically.

It should be noted that many new foster care review laws broaden the powers of the juvenile courts. Judges have generally been vested with placement review powers, but only where the child was placed as a result of a prior judicial determination of abuse, neglect or dependency. That is, the court had continued authority where it had initially assumed jurisdiction over the child, but not where the child was voluntarily placed. It has been estimated that approximately fifty percent of all children in foster care are placed there voluntarily, that is, by the action of their parents and without any judicial involvement. In certain states,[9] the percentage of voluntary placements is even higher.

The experience gained through the courts' long-standing placement review authority has been the foundation of the first nationwide effort to assure that judicial reviews are held annually. This concept began in the Kent County, Michigan Juvenile Court during 1972, through the use of a model case review system. Pursuant to a 1973 National Council of Juvenile and Family Court Judges' resolution which encourages courts to "act early and decisively in the disposition of children in placement", this review system has been expanded and replicated in thirty-seven courts.[10]

For some time, the Federal government has required a periodic review by the designated single state agency receiving Federal funds, for all children in foster care who receive services and maintenance under Title IVA of the Social Security Act.[11] In addition, this law has encouraged court involvement (if not periodic judicial review) by making such Title IVA payments dependent on a court adjudication and initial placement authorization for each child.[12] However, in many states, the majority of children in foster care are not claimed for Title IVA matching funds. For example, in 1977 out of an estimated 500,000 American children in foster care, only about 23% were receiving support under the Title IVA program.[13] Although many children are routinely processed through the courts to qualify for Title IVA funds, many also never have their cases heard in the judicial system.

In recent years, the use of procedures which the child placement agencies themselves can follow to track the progress of each foster care placement and avoid foster care "drift" has become widespread. These mechanisms, known as internal reviews, are presently the easiest (and least expensive) way of fulfilling Title IVA periodic review requirements (However, see below discussion re. P.L. 96-272). There has also recently been a development of review systems under the authority of a governmental entity other than the agency directly responsible for the child's care. These are known as external reviews.

In addition to judicial reviews, the most common form of exteranl review is the independent citizen panel. In 1974 the first state law establishing such a mechanism was enacted

in South Carolina.[14] Several other states followed suit in creating review boards.[15] However, it is important to point out that in all these states the courts still play a major role in the review board process in such areas as appointing board members, assigning them cases, providing a meeting place, hearing appeals by those aggrieved by board decisions, and receiving their reports as well as reviewing their actions.

The judicial review mechanism has been singled out by the author for a number of other reasons. With cases that have already been before the court, judges have a responsibility to assure that the children over whom they have exercized jurisdiction are receiving services which are in their best interests. They also have authority to compel welfare agencies to provide appropriate services for the child and parents. The results of the National Council of Juvenile and Family Court Judges' Children in Placement Project, which was initiated following their 1973 resolution, demonstrates that periodic judicial review of children in foster care is an effective means of aiding the return of children to their natural parents, increasing the filing of adoption petitions and petitions to legally free children for adoption, and separating children and parents from agency superivsion entirely.[16]

The actions of judges are likely to have greater impact than those of review boards or other reviewers. The authority of courts in this area has been well-established. Their decisions are likely to be given more binding weight than those of citizens, caseworkers, or administrators, which may be

merely advisory. Courts have subpoena power, the power to cite for contempt, and can order an agency to carry out their directives. Court procedures already in existence in juvenile sessions can also assure the rights of due process of law for the child, parents, and foster parents (e.g., right to notice of review hearing, opportunity to be present, review documents, be represented by counsel, question witnesses, etc.). Finally, only a judge can terminate parental rights, a legal pre-requisite to having a child formally adopted. Where review boards recommend such terminations, the case must still be referred to the court before that action may occur.

KEY ISSUES IN PERIODIC JUDICIAL REVIEW

Periodic judicial review of foster care placements operates in one of two basic ways. In some states, such as New York, reviews are specifically mandated by law at designated periodic intervals. In other states, however, the frequency of reviews (or whether they are held at all) is up to the discretion of the court system. Some judges may be more vigorous than others in assessing the progress children are making in foster care and in holding public agencies accountable for the treatment of such children. As stated earlier, children in care under voluntary placement agreements may not have their cases reviewed at all, and in most states the courts have no jurisdiction over these cases.

In some juvenile courts, the docket (delinquency, runaways, ungovernable children, abuse and neglect cases,

etc.) is so great, and the shortage of judges so severe, that when periodic placement review hearings are held, they are merely perfunctory. One commentator has noted that many hearings average less than five minutes, do not thoroughly explore the need for continued placement or its alternatives, and fail to involve the necessary parties, such as parents and social workers.[17] The successful implementation of judicial review systems in states with large numbers of children in foster care is thus likely to require legislation which provides for increasing the number of juvenile court judges, referees or commissioners.

The actual court review process is best examined by analyzing the system as it has been described for the Family Court in New York City. First, at the time the review petition is filed, material from the social services agency about the child and family, and the agency's recommendations, are included. Attorneys for the agency review these materials before they are filed. All interested parties are notified by mail of the actual hearing. This includes the parents as well as foster family.

The court may order the parents to undergo a psychiatric or psychological examination. The attorneys for the parties may inspect the agency's case records in advance of the hearing. The agency worker will appear at the hearing represented by an attorney; parents have the right to be represented by counsel, and in "contested" matters the child will be appointed a "Law Guardian". All court-appointed counsel are compensated at an hourly rate. The child need not be present. Following

the submission of evidence by all parties, the judge will decide whether foster care will continue (with or without a follow-up report) or the child discharged to parents, relatives or guardian. The judge will also decide whether to order that legal proceedings be instituted to free the child for adoption or to specifically order the child placed for adoption.

As to criticisms of this system, an early analysis of the New York City court review process found that the child welfare agencies were often late in submitting the proper petitions and accompanying forms, in some instances simply failed to file petitions at all, and had insufficient legal representation to quickly process cases. The Court itself had a large backlog of cases to review. Despite the law, placements were not being reviewed even though children were in care for over two years. In many cases, the agency's required detailed annual reports were filed late or not at all. In addition, court orders regarding child placement were too often being ignored.[18] This points out the need for adequate training, staffing and inter-governmental cooperation for both agency and court if judicial review is to be effective.

Court review in New York City has, however, demonstrated a positive impact in moving children out of foster care. Judicial reviews have been a useful systemic check against agency neglect. Their existence has countered the adage that the longer a child is in care, the more likely he or she

will remain in care until the age of majority. In response to the criticisms mentioned above, the New York City Family Court set up a system to notify agencies if their reports were overdue and assigned a probation officer to review agency reports for substantive compliance with court orders.

The Children in Placement Project (CIP) of the National Council of Juvenile and Family Court Judges has sponsored case review programs in a number of courts which have also met with success in moving children out of foster care. These programs differ from the New York model, in that they rely on volunteers who are delegated responsibility to examine agency and court records as well as to initiate action which will result in judicial follow-up. They are thus mostly court-administered rather than pure judicial reviews, and primarily involve a review of records rather than a full hearing for which parents are provided with notice and an opportunity to appear. In its first phase, the CIP project functioned in twelve courts. The project has since been expanded to twenty-five additional courts, and it now has training materials and orientation programs on CIP techniques available to all juvenile court judges.[19]

Why has court review, when diligently executed, been successful? First, where a court has a child's case already under its jurisdiction, it has a continuing and ultimate responsibility for that child and the authority to issue binding dispositional orders. Where the parents (or child)

are failing to receive adequate services, the court review hearing provides a forum in which the parties, through their attorneys, can challenge and obtain remedies for the agency's inaction. Social workers, anticipating judicial review hearings in which their conduct will be analyzed, have an incentive to diligently pursue actions which will avoid the continued use of foster care. Parents, knowing that the court will review their conduct and can order the termination of their "parental rights", are often induced to show a greater interest in their children and to correct the conditions which led to the foster home placement.

An early study of several hundred cases handled under the New York foster care review law found that there was strong agreement between the recommendations of the agency and the disposition of the court.[20] One possible reason suggested for this was that the agencies were cognizant of the forthcoming court hearing and acted more quickly in taking appropriate actions. By spurring agencies to take steps to move children out of foster care, the courts clearly served as an effective child welfare reform catalyst. The court was also seen as having an <u>immediate</u> impact on child placement issues, and its disposition orders were viewed as a means of expediting the removal of children from the foster care system.

There are, of course, going to be many instances where the courts and agencies disagree on what should be done in specific cases. Effective court review requires that the

judge closely scrutinize the agency service plan and recommendations and, where necessary, order that plans be drawn up where none exist, that parents be provided with intensive rehabilitative services, or that the foster parents be considered as an adoptive resource. Whether or not other case review systems exist, through such actions the courts can play a vital part in protecting children's rights.

A few years ago, a governmental evaluation was conducted of the New York City foster care system.[21] It disclosed that in prodding agencies to move towards finding permanent homes for children, the City's Department of Social Services' Office of Special Services for Children (SSC) "intervened significantly" in 9% of cases, while the Family Court did so in 43% of the cases. This study further indicated that the courts are taking a stronger interventionist role with children more recently involved in the foster care system. Agency service plans, goals, or timetables are being changed in an appreciable number of cases. Recommendations by the New York City Comptroller's Office, based on an intensive audit of the City's foster care system, urged not merely continuation but strengthening of the court review process.

The audit did express several concerns (which were also cited in the earlier study noted above). These concerns and their remedies are pertinent to all judicial review systems. Agencies too often flaunt court orders. In some cases the agency completely ignores the directive or fails to comply with some aspect of the decree. In other

instances, judges do not stand by their original decisions, but rather follow the agency's own plan despite strong evidence that the plan is not in the child's best interests.

The N.Y.C. Special Services for Children (SSC) agency responded to the audit by stating that the New York City Family Court had "no ability to handle the situation of non-compliance as it apparently has no well-working mechanism for strong follow-up and corrective action."[22] It concurred with the Comptroller on the recommendation for the establishment of an advisory Citizen's Review Board to assist the judge, but cautioned against giving the Board decision-making powers which are "inherent in the judge's role."

Such boards, in a manner similar to the work of the aforementioned Children in Placement Project, could assist the judges in whichever way they saw fit, such as abstracting case material, making preliminary findings, and following up to assure that court orders were being fully implemented. However, citizen volunteer boards or panels can too easily be allowed to substitute for the proper role of the judge, and inspections of agency reports and interviews with social workers permitted to replace full hearings attended by all interested parties.

PUBLIC LAW 96-272

On June 17, 1980 President Carter signed the "Adoption Assistance and Child Welfare Act of 1980" (previously known

as H.R. 3434). This law (P.L. 96-272) significantly revises the Social Security Act by establishing a new Federal program of adoption assistance payments, providing legal protections for all children in foster care for whom states receive Federal financial assistance, and making other major reforms in child welfare services. Using the carrot of increased Federal funding, the U.S. Department of Health and Human Services hopes that all states will quickly draft and comply with a new comprehensive plan applicable to all children in foster care.

According to one of the chief sponsors of this legislation, Senator Alan Cranston (D., Calif.), "some of the most critical provisions" of the law are contained in its section dealing with foster care case review.[23] In order for states to continue to receive Federal funds for foster care maintenance or child welfare services, they will now be required to provide a specific type of periodic review for "each child" in foster care [Sec. 471(a)(16)]. This review is defined to include a "dispositional hearing" to determine the child's future status. This hearing must be held by a court (or an administrative body appointed or approved by a court) "no later than eighteen months after the original placement (and periodically thereafter during the continuation in foster care)" [Sec. 475(5)(c)].

The Act has thus adopted the New York law (and the South Carolina review board process) and made one or the other a Federal requirement for each state if it wishes in the future to

receive funds from Washington for its foster care system. The implications are obvious. Those states which do not have external review mechanisms had better begin now to plan their development. In many cases, this will require new state legislation and expenditures for additional judges and/or citizen review board staff. As this is being written, Federal regulations to implement P.L. 96-272 are being drafted. They are likely to spell out the specific procedures for these periodic reviews in greater detail, including those rights to be afforded the parents, child and foster family at the periodic review hearing.

PROBLEMS TO BE ANTICIPATED WITH EXPANDED COURT REVIEW

Effective foster care review systems require adequate funding and expertise. The impact of P.L. 96-272, the heightened consciousness of the plight of foster children, and the trend towards enactment of new state periodic review laws are all increasing these needs. Fortunately, a number of orginirations have begun initiatives related to these subjects.

The Children's Bureau of the U.S. Department of Health and Human Services has contracted for a number of studies of foster care review systems. Hopefully, it will be providing technical assistance to states to help them develop the case review systems required under P.L. 96-272. The National Council of Juvenile and Family Court Judges has just completed

a Judicial Review of Children in Placement Deskbook to aid judges with their expanded responsibilities.

Legislators and lawyers also have an expanded role to play in this area. The National Legal Resource Center for Child Advocacy and Protection, a program of the American Bar Association, has initiated a special project to encourage and support legal reforms among the states and to train attorneys involved in foster care cases.

There is a serious need to prepare attorneys for the state, county or city welfare agencies to take initiative in these cases and handle them as vigorously as criminal proceedings or major law suits. These lawyers are, in many ways, the linchpins of the system. If they are not responsive to the needs of children and are not constantly available to consult with social workers, review case files, and initiate appropriate and timely legal actions, the periodic review process may still fail to achieve appropriate results.

One current obstacle in the development of external review systems is the requirement of confidentiality and the right of privacy of parents whose children are in foster care. The Social Security Act requires that states protect against the "use or disclosure" of information concerning welfare applicants; this has resulted in widespread restrictions on access to records concerning child welfare cases to anyone outside of the public agency which has custody of the child.[24] Since volunteers or staff of review boards need to regularly examine agency case records, any conflict between privacy laws and periodic review responsibilities must be resolved.

One remedy is for the agency to "sanitize" the case records given to the reviewers by expunging all names and other identifying data. This, however, is impractical, and may result in ineffective reviews. Without a change in the law, or full agency cooperation, citizen review boards may have continual problems regarding case record access. Judges, however, can subpoena agency files and delegate authority to reviewers, as "officers of the court", for purposes of agency record analysis, with such individuals swearing to an oath of confidentiality. Courts are also best equipped to handle requests for access to agency records by parents, foster parents, and attorneys.

Adequate funding for new judicial review systems is also essential if these systems are to be of full value. Many courts now rely completely on volunteers for reviewing records. Chief judges will have to be aggressive in going to their legislatures and asking for larger budgets to increase court staffs and judicial personnel. Increased funds available to states under Title IVB of the Social Security Act (pursuant to P.L. 96-272) can be a source of new money for this purpose. The Title XX program of the Social Security Act, with up to $2.9 billion available to the states in FY 1981, is another source that should be tapped. The CETA program may also provide funding for new court employees to assist in the review process. Finally, LEAA or Juvenile Justice Act state block grant funds should be considered as a potential resource, since adequate treatment of children in the foster care system is an important early step in delinquency prevention.

Those seeking new funding to staff periodic review mechanisms should be familiar with data which indicates how foster care system reform can be cost-effective. In South Carolina, for example, the annual foster care cost has been estimated at $2,000 per child, or $6 million for the State's 3,000 children in such placement. According to this estimate, if only half of the 3,000 were to leave foster care, at least $3 million in public funds would be saved each year.[25] The New York City Comptroller's Office has made an even more astounding finding. If all the City's children in foster care had been discharged or adopted on a timely basis, the City would have saved almost $206 million.[26]

CONCLUSION

It has been noted that in addition to an effective periodic review system, there are other critical components of foster care reform.[27] These include a workable termination of parental rights law, a subsidized adoption statute, and an available substantial array of services to families which may avoid the need for initial removal of the child. Indeed, the periodic review hearing should be an opportunity for the court to examine every alternative option to foster care and carefully scrutinize whether the agency responsible for the child has done the same. During the review hearing, certain fundamental questions should be answered:

1) Have reasonable efforts been made to return the child to his or her home?

2) Are the child, parents and foster parents receiving proper services?

3) Can the child return home? If not, why not?

4) What must happen before the child can return home?

5) In the interim, is this placement the least restrictive (most family like) available and as close as possible to the parents' home so as to facilitate visitation?

6) Does the child's case plan need to be modified?

7) By what date may it be expected that the child will return home or be placed for adoption or legal guardianship?

Periodic court review is an excellent mechanism to assure that public agencies legally responsible for children in foster care plan effectively to meet their long-term permanent needs. All concerned parties should be given an opportunity to participate in a hearing which discusses the above and other necessary questions. They should also have the assistance of diligent representation to protect their rights and interests. With the help of a properly functioning judicial review process, those harms which have been perpetrated by our child welfare systems on both children and their parents can begin to be corrected.

FOOTNOTES

1. See, e.g., J. Knitzer and M. L. Allen, Children Without Homes (Washington, D.C.: Children's Defense Fund, 1978); S. Vasaly, Foster Care in Five States: A Synthesis and Analysis of Studies from Arizona, California, Iowa, Massachusetts and Vermont (Washington, D.C.: Dept. of H.E.W., 1976); Joint Hearings on Foster Care Before the House Subcomm. on Select Education and the Senate Subcomm. on Children and Youth, 94th Cong., 1st Sess. (1975).
2. Report of the House Committee on Ways and Means, No. 96-136, 96th Cong., 1st Sess. (1979), P. 30.
3. Report of the National Commission on Children in Need of Parents: Who Knows? Who Cares? Forgotten Children in Foster Care (New York, 1979), P. 11.
4. N.Y. Social Services Law §392.
5. See Note 1.
6. T. Festinger, "The New York Court Review of Children in Foster Care," 54 Child Welfare 211, 212 (April, 1975).
7. See, e.g., Fla. Stat. Ann. §409.168; Mo. Ann. Stat. §§453.305; 453.310; Va. Code §16.1-282; W. Va. Code §49-6-8.
8. Judicial Review of Children in Placement Deskbook (Reno, Nev.: National Council of Juvenile and Family Court Judges, 1980), P. 83.
9. Legal Issues in Foster Care (Washington, D.C.: National Association of Attorneys General, Feb. 1976), P. 1; The high percentage of voluntary placements, estimated as high as 90% in some states, was noted by the U.S. Supreme Court in Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 824 n.9 (1977).
10. Children in Placement Project Training Manual (Reno, Nev.: National Council of Juvenile and Family Court Judges, n.d.).
11. 42 U.S.C. §608 (f); 45 C.F.R. §233.110(a)(2).
12. 42 U.S.C. §608(a).
13. See Note 2.
14. S.C. Code Ann. §§43-13-10 to 43-13-80.
15. See, e.g., Ariz. Rev. Stat. §§8-515, 516; Md. Ann. Code Art. 88-A, §§111-117; N.J. Stat. Ann. §30.4C-50; Ohio Rev. Code Ann. §5103.151; Tenn. Code Ann. §§37-1501-37-1510.
16. J. Steketee, "The CIP Story," 28 Juvenile Justice 4 (May, 1977).
17. M. Wald, "State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights," 28 Stanford Law Review 623, 681-684 (April, 1976).
18. Festinger, supra note 6, at 241-242.
19. See, notes 8 and 10; Information and materials can be obtained from Phyllis Kilbreath, Director, Children in Placement Project, National Council of Juvenile and Family Court Judges, P.O. Box 8978, Reno, NV 89507.

20. Festinger, supra note 6, at 242-243.
21. The Children Are Waiting: The Failure to Achieve Permanent Homes for Foster Children in New York City, Report of an Audit by the New York City Comptroller's Office (n.d.).
22. Ibid., P.46.
23. Statement in Congressional Record, S6942, June 13, 1980.
24. 42 U.S.C. §602(a)(9).
25. B. Chappell, "Organizing Periodic Review in Foster Care: The South Carolina Story," 54 Child Welfare 477, 485 (July, 1975).
26. The Children Are Waiting, supra note 21, at 12.
27. A. Guttenberger, "Foster Placement Review: Problems and Opportunities, " 83 Dickinson Law Review 487, 512-513 (Spring, 1979).

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Within the overall structure of the American Bar Association, the Young Lawyers Division [YLD] occupies a unique position. Unlike the other organizational components of the ABA, YLD activities are not limited to any one substantive area of the law. Instead, YLD interests cut across all of the Association's professional and public interest programs. In effect, the YLD functions as a complete bar association with its own national leadership structure for the younger members of the bar [defined as all attorney members of the ABA under the age of 36 or those who have been admitted to the bar for less than three years], while at the same time functioning as a full participant in the work of the Association's overall Section, Division and Committee structure. With more than 155,000 member attorneys drawn from all fields of practice, the YLD is the largest single membership group within the ABA.

Young lawyers have traditionally been the most dedicated volunteers in the public service and pro bono work of the organized bar, and the national leadership of the YLD has sought to harness this idealism and commitment in coordinated efforts to address major issues and problems. The Division sponsors an active Affiliate Activation and Outreach Program which provides technical assistance and on-site consultation to affiliates [Young Lawyers groups at the State or Local Bar level] seeking to undertake local public service action programs. Nearly one hundred new affiliate programs are generated each year.

The Young Lawyers Section of the Philadelphia Bar Association has, since 1971, sponsored a volunteer child representation program in Philadelphia. The efforts of this group inspired the creation of the National Legal Resource Center for Child Advocacy and Protection.